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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 13.

IOWA LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

LULA T. LEWIS.

In Error to the Circuit Court of the United States for the Northern District of Texas.

Reply Brief for Plaintiff in Error.

By MR. FRED E. DOOLE,
Dallas, Texas.

IN THE

Supreme Court of the United States.

IOWA LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

LULA T. LEWIS.

18,072.
OCTOBER TERM, 1902.
No. 53.

Reply Brief for Plaintiff in Error.

FIRST PROPOSITION.

Mr. Starn's agency contract expressly limited his office to matters wholly foreign to death claims and proofs of death, and denied to him any authority to waive provisions of the insurance contract (Tr., 32 and 33).

The policy sued on contains a similar limitation upon the power of the agent (Tr., 31–32).

The signature of Mr. Starn to the application as "general agent," if not a mere clerical error, was his own declaration only, and not evidence of his authority. His contract and instructions, and all the testimony, show that he was not a general agent, but was a special agent of narrowly circumscribed functions.

Mr. Starn's letter head, on which he described himself as "Dist. Manager," was likewise only his own declaration.

Besides, it was not shown ever to have been seen by the plaintiff or the assured, or approved by the defendant.

There is no issue of apparent authority in the case, the plaintiff's allegation being one of actual authority.

The letter of the general counsel was written after this action had been begun and process had been served; and it was not pleaded by the plaintiff. Therefore it can form no part of her cause of action. She must stand upon her rights as they existed when she filed her suit.

To the list of authorities at the bottom of page 17 of my original brief, I beg to add a case recently decided by this court.

> Northern Assurance Co. *vs.* Grand View Bldg. Assn., 183 U. S. 308.

SECOND PROPOSITION.

No issue of fact was determined against the defendant in this matter. The court instructed the jury that the forfeiture clause on the back of the premium receipt was not a part of the contract.

The defendant waived the condition of the policy requiring that the premium be paid in cash, but did not waive it unconditionally. The premium receipt given by the defendant, accepted by the assured, and sued on by the plaintiff, was not regular and unconditional upon its face as stated by counsel in their brief. Upon its face it was expressly made "subject to the terms of the contract and the conditions on the back hereof." One of those conditions was:

> "If note be given for the payment of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine" (Tr., 28).

The reference to the application and policy for the terms of the mutual agreement of course related only to matters not then before the eye of the reader—to the general contract of

insurance, and not to the subsidiary contract whereby a note was substituted for the cash payment of premium required by the policy. It could mislead no one.

The premium receipt was not a volunteer paper, causelessly injected into the transaction by the defendant. The policy itself in terms provided for the giving of just such a receipt (Tr., 26–27).

THIRD PROPOSITION.

I ask leave to add the following cases to the list of authorities at the top of page 29 of my original brief:

Verzan *vs.* McGregor, 23 Cal. 339.
Heywood *vs.* Perrin, 10 Pickering 228.
Myers *vs.* Munson, 65 Iowa 423.

FOURTH PROPOSITION.

If the clause on the back of the receipt forms a part of the contract, then the contract contains a stipulation for forfeiture of the insurance upon non-payment of the premium note. Unquestionably the policy was in full force during the currency of the note; but when default was made in the payment of the note, the insurance ceased ipso facto. The situation then was, that the assured had enjoyed six months of insurance for which he had paid nothing except his dishonored note.

Counsel rely upon the case of Insurance Co. *vs.* French, 30 Ohio St. 240, as authority for the proposition that an affirmative forfeiture of the insurance was necessary. That case rested upon peculiar facts. An unconditional receipt had been given for the premium, and the company had been in the habit of extending the time for the payment of past due premiums on that policy. The very note for whose non-payment forfeiture was claimed represented in part the unpaid interest due on former notes. No such facts exist in the case at bar. Moreover, the French case was decided twenty-

six years ago and never has been generally accepted as authoritative. I believe it never has been cited by the supreme court of Ohio, and never by this court save once when it was distinguished. In so far as its language supports the broad proposition that an insurance contract which in terms provides for automatic forfeiture can be forfeited only by affirmative action, the French case stands alone, opposed by reason and by the overwhelming weight of authority.

FIFTH PROPOSITION.

To the authorities cited on pages 32 and 33 of the original brief, I beg to add a recent decision of the supreme court of Iowa; which holds upon satisfactory reasoning that when a policy is forfeited by the non-payment of a note representing the entire premium, the insurance company is yet entitled to collect the whole amount of the note, the unearned portion as well as the earned.

Economic Life Assn. *vs.* Spinney, 89 N. W. Rep. 1095.

SIXTH PROPOSITION.

The Supreme Court of Missouri has lately held unconstitutional the penalty statute of that State, which is quoted on page 49 of the original brief.

Thompson *vs.* Traders Ins. Co., 68 S. W. Rep. 889.

SEVENTH PROPOSITION.

The question whether demand was necessary to mature the right to the penalties arose upon demurrer (Tr., 17), as well as upon exceptions to the charge of the court. No demand was alleged by the plaintiff (Tr., 11–13), and none ever was made, except by the institution of this action (Tr., 35).

Respectfully submitted.

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